CASE NO. 1:16-cv-08423

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re: CAESARS ENTERTAINMENT OPERATING COMPANY, INC., ET AL., *Debtors.*

CAESARS ENTERTAINMENT OPERATING COMPANY, INC., ET AL., *Appellants*,
v.
BOKF., N.A., WILMINGTON SAVINGS FUND SOCIETY, FSB, RELATIVE VALUE-LONG / SHORT DEBT PORTFOLIO, A SERIES OF UNDERLYING FUNDS TRUST, TRILOGY PORTFOLIO COMPANY, LLC AND FREDRICK BARTON DANNER, *Defendants-Appellees.*

Appeal from the United States Bankruptcy Court for the
Northern District of Illinois, Case No. 15-01145, Adv. Pro. No. 15-00149
(Goldgar, J.)

UNSECURED NOTES DEFENDANTS'[1] OBJECTION TO DEBTORS' EMERGENCY MOTION FOR ADMINISTRATIVE RELIEF

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[1] The Unsecured Notes Defendants are, collectively, Relative Value-Long/Short Debt Portfolio, a Series of Underlying Funds and Trilogy Portfolio Company, LLC ("Unsecured Notes Defendants").

Counsel for Appellees Relative Value-Long/Short Debt Portfolio, a Series of Underlying Funds Trust, and Trilogy Portfolio Company, LLC

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CAESARS ENTERTAINMENT OPERATING COMPANY, INC., *et al.*,	)	
Plaintiffs-Appellants,	)	Case No. 1:16-cv-08423
v.	)	
BOKF, N.A., WILMINGTON SAVINGS FUND SOCIETY, FSB, RELATIVE VALUE-LONG/SHORT DEBT PORTFOLIO, A SERIES OF UNDERLYING FUNDS TRUST, TRILOGY PORTFOLIO COMPANY, LLC, AND FREDERICK BARTON DANNER,	)	Judge Robert W. Gettleman
Defendants-Appellees.	)	

UNSECURED NOTES DEFENDANTS'[1] OBJECTION TO
DEBTORS' EMERGENCY MOTION FOR ADMINISTRATIVE RELIEF

The Unsecured Notes Defendants respectfully submit this objection (the "Objection") to the Debtors' Emergency Motion for Administrative Relief ("Emergency Motion").[2]

A. There is No Authority for an "Administrative Stay" in the Northern District of Illinois.

In the Emergency Motion, the Debtors request an "administrative stay" pursuant to Rules

[1] The Unsecured Notes Defendants are, collectively, Relative Value-Long/Short Debt Portfolio, a Series of Underlying Funds and Trilogy Portfolio Company, LLC ("Unsecured Notes Defendants").

[2] The Unsecured Notes Defendants also object to the submission and the Court's consideration of any statement or response submitted in support of the Emergency Motion by entities that are not party to the underlying adversary proceeding or the appeal, such as the Ad Hoc Bank Lender Committee, the Ad Hoc Committee of First Lien Noteholders, and the Statutory Unsecured Claimholders' Committee.

8007(b)(1) and 8013(d) of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") extending an injunction enjoining the Unsecured Notes Defendants from prosecuting litigation against non-debtor Caesars Entertainment Corporation ("CEC") pending in the United States District Court for the Southern of New York (the "Unsecured Notes Defendants' Action"). However, neither Bankruptcy Rule 8007(b)(1) nor 8013(d) provide for the relief requested. Bankruptcy Rule 8007(b)(1) allows a party to move the district court for "a stay of a judgment, order, or decree of the bankruptcy court pending appeal." Fed. R. Bankr. P. 8007. Presumably, that is what the Debtors will seek in their forthcoming "Emergency Motion to Enjoin the Guaranty Actions Pending Appeal." Bankruptcy Rule 8013(d) simply provides the procedure governing emergency motions. The Bankruptcy Rules furnish no basis for the intermediate relief sought by the Debtors, that is, a stay pending ruling on a to-be-filed emergency motion for a stay, and, accordingly, the Emergency Motion must be denied.

The non-Seventh Circuit cases cited by the Debtors in support of their request are inapposite. For example, in *Brady v. National Football League*, 638 F.3d 1004 (8th Cir. 2011), the temporary stay was granted pursuant to Rule 27A(b)(4) of the Eighth Circuit Local Rules, which expressly authorize the court to "order[] a temporary stay of any proceeding pending the court's determination of a stay application."[3] *See also In re Grand Jury Proceedings*, 841 F.2d 230, 232 (8th Cir. 1988). Similarly, *Cobell v. Norton*, No. 03–5262, 2004 WL 603456 (D.C. Cir. 2004) and *Twelve John Does v. District of Columbia*, 841 F.2d 1133, 1137 (D.C. Cir. 1988) are

[3] In his dissent, Judge Bye noted that application of the rule is only appropriate in "true emergencies," such as the imminent deportation of an immigrant or the midnight execution of a criminal defendant. *Brady*, 638 F.3d at 1005-06 (Bye, dissenting). CEC, who hopes to avoid oral argument on long-pending motions for summary judgment, "is certainly not in the same emergency position as an immigrant about to be removed, or an individual about to be executed, who cannot so easily reverse the consequences of initially allowing a district court's order to take effect." *Id.* at 1006.

decisions by the United States Court of Appeals for the District of Columbia Circuit, whose procedures provide for such relief. *See Cobell*, 2004 WL 603456 at *1 (citing *D.C. Circuit Handbook of Practice and Internal Procedures* 32-33 (2002)).

The Debtors have not, and cannot, cite to any local rule of the United States Bankruptcy Court or District Court for the Northern District of Illinois equivalent to the rules of the Eighth Circuit and the D.C. Circuit. The Debtors' citation to *St. John's United Church of Christ v. City of Chicago*, 401 F.Supp.2d 887 (N.D. Ill. 2005) is misleading. In *St. John's*, the court simply noted, in passing, that the D.C. Circuit previously granted the petitioners an administrative stay pending resolution of their motion for a stay pending appeal. *See id.* at 893. The court neither entertained a request for nor opined on the availability of an administrative stay.

B. The Debtors Are Not Entitled to a Stay Pending Appeal.

Given that there is no authority for an "administrative stay" in the Northern District of Illinois, the best the Debtors can hope for is a stay pending appeal pursuant to Bankruptcy Rule 8007(b)(1). "The standard for granting a stay pending appeal mirrors that for granting a preliminary injunction." *In re A & F Enterprises, Inc. II*, 742 F.3d 763, 766 (7th Cir. 2014). Thus, a court must consider: "1) whether the appellant is likely to succeed on the merits of the appeal; 2) whether the appellant will suffer irreparable injury absent a stay; 3) whether a stay would substantially harm other parties in the litigation; and 4) whether a stay is in the public interest." *In re 203 N. LaSalle St. P'ship*, 190 B.R. 595, 596 (N.D. Ill. 1995). Here, this Court has all the information it needs to reject such a request outright.

First, the Debtors are not likely to succeed on the merits on their appeal. The district court reviews the denial of an injunction by a bankruptcy court for an abuse of discretion. *See In re Caesars Operating Co., Inc.*, 2015 WL 5920882 at *3 (citing *In re Rimsat, Ltd.*, 212 F.3d

1039, 1049 (7th Cir. 2000); *In re Brittwood Creek, LLC*, 450 B.R. 769, 744 (N.D. Ill. 2011)). A bankruptcy court abuses its discretion when "it commits an error of law or makes a clearly erroneous finding of fact." *Kress v. CCA of Tenn.*, LLC, 694 F.3d 890, 892 (7th Cir. 2012). Under this standard, this court should reverse "only where no reasonable person could take the view adopted by the [bankruptcy] court." *Bedrossian v. Northwestern Memorial Hospital*, 409 F.3d 840, 845 (7th Cir. 2005). Furthermore, the district court judge is required to accept the bankruptcy judge's findings on questions of fact as long as they are not clearly erroneous. *See Matter of Tolona Pizza Products Corp.*, 3 F.3d 1029, 1033 (7th Cir. 1993). "The clearly erroneous standard requires this court to give great deference to the bankruptcy court, the trier of fact." *Matter of Love*, 957 F.2d 1350, 1354 (7th Cir. 1992).

Here, the bankruptcy court's decision to deny the Debtors' motion for an Order extending the section 105 injunction was supported by extensive factual findings developed during the three-day evidentiary hearing. As Judge Goldgar stated while denying the Debtors' oral motion for a stay pending appeal:

> Also, I do not believe you have even a reasonable likelihood of success on appeal. This was the very factual determination that the court of appeals said that I had to make. Findings of fact are determined under a clearly erroneous standard. The exercise of my discretion in granting an injunction requires an abuse of discretion - in other words, a showing that no reasonable person could have made the decision that I made. And that's a really hard standard to meet. And, not surprisingly, I think what I did was reasonable or I wouldn't have done it. But I think you're quite unlikely to meet that standard.

August 26, 2016 Hearing Tr. at 28:10-22 (a copy of the transcript, which the Debtors failed to attach to the Emergency Motion and Notice of Appeal, is annexed hereto as Ex. A). This Court should not second guess the bankruptcy court's determination that, based on three evidentiary hearings on this issue and its 20-month history with the case, the Debtors are not entitled to an extension of the section 105 injunction.

Second, there is no risk of irreparable harm. The "looming catastrophe" is merely oral argument on motions for summary judgment, which the Honorable Jed S. Rakoff, the United States District Court Judge presiding over the Unsecured Notes Defendants' Action, has scheduled for August 30, 2016. For the second time, the Debtors seek to indefinitely postpone these proceedings on the eve of argument for the benefit of non-debtor CEC. It is worth noting that CEC itself has never seen fit to petition Judge Rakoff for such relief. In any event, to the extent the Unsecured Notes Defendants' action poses any threat to CEC or the Debtors, which is unlikely given that it is undisputed that CEC can pay $14 million and still make the contemplated contribution to the Debtors' restructuring, the purported risk lies in the enforcement of a judgment, not the adjudication of the pending motions. If a judgment is entered in favor of the Unsecured Notes Defendants, there are avenues available to CEC, such as a bonded appeal, to prevent the parade of horribles invoked by the Debtors. In these circumstances, the Debtors are not entitled to the "extraordinary remedy" of a stay pending appeal. *Adams v. Walker*, 488 F.2d 1064, 1065 (7th Cir. 1973).

The final two factors also weigh against granting any stay, be it an "administrative stay," a stay pending appeal or the *de facto* "automatic stay" in favor of non-debtor CEC the Debtors seek in requesting an injunction through confirmation. The potential harm to the Debtors is remote, since there is no question CEC can satisfy a $14 million judgment and still contribute to the Debtors' reorganization. The public interest also does not support a further stay because, as Judge Goldgar found, a successful reorganization is possible, with or without an injunction, and, to date, the injunction has proven more of an impediment than an aid to settlement in this matter. August 26, 2016 Hearing Tr. at 16:17-17:1. Each of the previous two times the Debtors sought an injunction from the bankruptcy court, they claimed it would facilitate a settlement with the

Unsecured Notes Defendants. Judge Goldgar found precisely the opposite—following the entry of the second injunction on June 15, 2016, the Unsecured Notes Defendants "practically begged for an opportunity to discuss settlement but did not gain an audience until August 2." August 26, 2016 Hearing Tr. at 9:17-20. Because "it isn't injunctive relief that promotes settlement here, but rather its absence," the public interest does not support the granting of a stay. August 26, 2016 Hearing Tr. at 10:2-4.

For the foregoing reasons, the Court should deny the Emergency Motion, and grant such other and further relief as the Court deems just and proper.

Dated: August 28, 2016
Chicago, IL

Respectfully submitted,

DRINKER BIDDLE & REATH LLP

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CERTIFICATE OF SERVICE

I, Timothy R. Casey, an attorney in the law firm of Drinker Biddle & Reath LLP, certify that on this 29th day of August 2016, a true and correct copy of the foregoing ***Unsecured Notes Defendants' Objection to Debtors' Emergency Motion for Administrative Relief*** was served (i) via operation of the CM/ECF System for the United States District Court for the Northern District of Illinois on all registered users thereof and (ii) via First Class U.S. Mail and e-mail as indicated on the attached Service List.

By: /s/ Timothy R. Casey
Timothy R. Casey

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EXHIBIT A

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF DIVISION
EASTERN DIVISION

CAESARS ENTERTAINMENT OPERATING COMPANY, INC., ET AL.,	)	
Plaintiff,	)	No. 15 A 00149
vs.	)	
BOKF, N.A., ET AL.,	)	Chicago, Illinois
Defendant.	)	August 26, 2016
----------	)	3:00 p.m.
CAESARS ENTERTAINMENT OPERATING COMPANY, INC., ET AL.,	)	No. 15 B 01145
Debtor.	)	

TRANSCRIPT OF PROCEEDINGS BEFORE THE
HONORABLE A. BENJAMIN GOLDGAR

APPEARANCES:

For the Plaintiff/Debtor: Mr. David Zott;

For the Second Lien Noteholders: Mr. Tim Hoffman;

This matter is before me for ruling after a three-day evidentiary hearing on the motion of debtors Caesars Entertainment Operating Co. (or "CEOC") and its subsidiaries to extend the section 105 injunction I issued on June 15. The injunction expires on August 29. The injunction halted civil actions against non-debtor parent company Caesars Entertainment Corp. (or "CEC") seeking to reinstate and recover on CEC's guarantees of various CEOC notes. Most of those actions are pending in the U.S. District Court for the Southern District of New York. One is pending in the Delaware Chancery Court. There are fully-briefed cross-motions for summary judgment pending in all the actions, and the district court has set oral argument on the motions for August 30, the day after the current injunction expires. The debtors would have me extend the injunction and enjoin the guaranty plaintiffs - the defendants here - from pursuing the actions until a decision on plan confirmation in the underlying bankruptcy cases.

The findings in my opinion dated July 22, 2015, the first injunction order dated February 26, 2016, and my ruling on June 15, 2016, addressing the second injunction request, are incorporated. Today's decision assumes familiarity

with those decisions, the identities of the many parties, and the identities of the various witnesses at the hearings.

For the reasons I will now discuss, the debtors' motion to extend the existing injunction will be denied.

The premise of all of the debtors' requests for injunctive relief has been that the bankruptcy estates have claims against CEC, just as the guaranty plaintiffs do, and the estates' claims against CEC are assets of the estates. The court of appeals described the rest of the debtors' theory this way. "If before CEOC's bankruptcy is wound up," the court said, "CEC is drained of capital by the lenders' suits to enforce the guaranties that CEC had given them, there will be that much less money for CEOC's creditors to recover in the bankruptcy proceeding. . . . The less capital CEC has for CEOC to recapture through prosecution or settlement of its fraudulent-transfer claims, the less money its creditors will receive in the bankruptcy proceeding." Caesars Entm't Operating Co., Inc. v. BOKF, N.A. (In re Caesars Entm't Operating Co.), 808 F.3d 1186, 1189 (7th Cir. 2015). What's more, the court continued, "[o]ne can envision

a situation in which CEC, having both obligations on the guaranties it issued to CEOC's lenders, and obligations to CEOC arising from the latter's fraudulent-transfer claims, would lack the money to satisfy all its obligees." Id. The court of appeals noted CEOC's contention "that if the guaranty litigation against CEC can be frozen for a time . . . , the bankruptcy examiner's report analyzing the disputed transactions will provide the parties with information they need to have a clear shot at negotiating an overall settlement." Id.

That was in response to the debtors' first motion for injunctive relief. The motion sought an injunction only until 60 days after the examiner issued his initial report, or May 9, 2015, whichever was greater. On remand from the court of appeals, I granted the motion and issued the injunction, noting that the injunction was only temporary and designed to promote a resolution of these cases through a consensual plan. A month after the first injunction expired, the debtors sought a second one on an emergency basis. The premise: That progress on the settlement front justified additional relief, this time through a decision on confirmation. After an evidentiary hearing, I granted the motion,

despite deficiencies in the evidence, because enough progress was demonstrated to warrant relief. But the injunction was given an August 29 expiration date. I warned that the chances of further relief were slim, and the August 29 date should be treated as a deadline.

Despite that warning, on August 8 the debtors moved to extend the current injunction, again asking for relief through a decision on plan confirmation. The confirmation hearing is set to begin January 17, 2017. There is, of course, no date for a decision on a hearing that has yet to be held.

The requirements for a section 105 injunction differ somewhat from the requirements necessary for injunctive relief in other contexts. Rather than a likelihood of success on the merits, the debtor must show a likelihood of a successful reorganization. The debtor must also show that the denial of relief threatens the reorganization. Or, as the court of appeals put it here, the question the debtors raise is "whether the injunction sought by CEOC is likely to enhance the prospects for a successful resolution of the disputes attending its bankruptcy. If it is, and its denial will thus endanger the success of the bankruptcy proceedings,

the grant of the injunction would, in the language of section 105(a) be 'appropriate' . . . ." BOKF, 808 F.3d at 1188-89. The debtor must also show that the public interest favors relief. And, I will now conclude, the debtor must show that the balance of equities weighs in its favor. There is no irreparable harm requirement.

A section 105 injunction is considered a drastic and extraordinary remedy, one rarely sought and even more rarely granted. That's the case because an injunction confers one of the principal benefits of bankruptcy - protection from the collection efforts of creditors - on someone who has not chosen to assume the burden of filing a bankruptcy case of his own. It's also the case because the injunction impairs the rights creditors have under state law and interferes with the work of other courts - in this case the work not only of a U.S. district court but the court of another sovereign, the state of Delaware. To me, that last point is critical and makes a section 105 injunction a remedy never to be granted lightly. As with all injunctions, a section 105 injunction is an equitable remedy. Whether an injunction should be granted is thus a matter for my discretion.

In this case, the evidence supports only one of the four elements necessary for the relief the debtors want. The other elements weigh in favor of a denial.

First, the evidence showed, as it has shown at past hearings, that the debtors do have a likelihood of reorganizing successfully. The debtors have a strong business that has done well since these cases were filed. The evidence showed that the debtors have outperformed projections during the first half of this year and have met projections in June and July. David Hilty, the defendants' expert, agreed there is a likelihood of a successful reorganization here.

But I'm no longer convinced, as I had been in the past, either that an injunction is likely to enhance the success of a reorganization or that its denial will endanger that success.

First, I can't find, given the history of the parties' negotiations, that an injunction is likely to enhance the prospects for a successful resolution of the disputes in these bankruptcies. Most of the deal-making that has happened here has occurred when no injunction was in effect. This is particularly true of events in late

May and early June of this year. The progress on settlement that I found justified a second injunction this past June all took place when CEC had no protection from an injunction and deadlines in the guaranty litigation were looming. As for what happened after the June 15 injunction the answer is: Not that much. The post-June 15 progress the debtors cite consists mostly of restructuring support agreements (or "RSAs") previously reached being executed or becoming effective. That can't be dismissed entirely, but it's the reaching of an agreement in principle that matters most, not its execution. The RSAs with CEC, the UCC, the SGNs, and the first lien notes were all reached before June 15. As of June 15, negotiations with the first lien banks were continuing, but an agreement was reached just 5 days later, suggesting one was well in the works as of the injunction date.

Since June 22, the debtors can point only to the Danner RSA and the second lien notes RSA. But the significance of the Danner RSA is doubtful. As for the second lien notes RSA, that RSA is not effective, won't ever become effective (given the cooperation agreement among the dissident noteholders requiring them not to sign it), and has a

$950 million funding shortfall. Whether that shortfall will be made up - and if so, when and by whom - is purely speculative.

Negotiations with the guaranty plaintiffs, both the second lien noteholders and the unsecured noteholders, have also proceeded at a pace that shows no real urgency on the part of the debtors' camp. Although there have been five mediation sessions involving the second lien noteholders, the first new proposal to them was not made until August 2. The noteholders countered that day but never received a response. Since August 17, when I gave another thinly-veiled warning that further injunctive relief was unlikely, the second lien noteholders have offered to meet, but CEC refused to participate in a meeting unless the parties' mediator could participate. The unsecured noteholders, meanwhile, practically begged for an opportunity to discuss settlement but did not gain an audience until August 2. Ultimately, they were told that further settlement discussions were pointless until a deal with the second lien noteholders was struck.

The pace of discussions does not show that the current injunction is helping or that

its expiration gives the parties much cause for concern. Given this history, in fact, it appears that it isn't injunctive relief that promotes settlement here but rather its absence. The deadlines in the underlying guaranty litigation are what prompt the parties to act.

The debtors disagree, pointing to the mediator's assertion in a written statement that the parties have made "material progress." Again, however, the mediator didn't testify, so there was no opportunity to probe that assertion. His written statement seems to assume that progress consists primarily of frequent meetings and discussions, since that takes up the majority of his statement. Certainly, it's better for the parties to meet and discuss than not, but meeting and discussing alone, without more, isn't progress. His statement fails to describe the discussions themselves, the dates or locations when they took place, any proposals exchanged, or any distance remaining between the parties. The only actual progress, in the sense of an agreement, that the mediator cites, is the second lien notes RSA. It's hard to conclude that that RSA represents much progress toward a settlement here.

Almost 20 months have passed

since these bankruptcy cases have been filed. During that time, the debtors and CEC have had the benefit of two injunctions totaling 5 months, both issued in 2016. The first extended from February 26 to May 9, the second from June 15 to August 29. During that time, no consensual resolution of these cases has been reached, although that was unquestionably what the court of appeals had in mind. The debtors have had the "clear shot" the court mentioned.

Particularly disturbing is that none of the targets of the estates' claims arising from the disputed transactions – targets that include the ultimate owners of the Caesars enterprise, Apollo and TPG – are making any financial contribution to the reorganization, although the proposed plan would release all the claims against them (both the estate's claims and the claims in the guaranty litigation). James Millstein, the debtors' restructuring advisor, was asked about this at the first hearing in June 2015 and again at the second hearing this past June. At both hearings, he admitted that the only party providing a contribution was CEC. Incredibly, the testimony this week was that the targets of these claims were not even approached about making a contribution until two

weeks ago. These parties are the same ones the examiner concluded in his report are potentially liable to the estates for $3.6-5.1 billion. Yet asked at his deposition whether any of these parties had been approached, Ronen Stauber testified: "I don't know." This, from a member not only of the CEOC Board but the Board's restructuring committee.

Worse still, Brendan Hayes, another of the debtors' restructuring advisors, testified that when Apollo and TPG were at last approached about funding the $950 million "hole" in the second lien notes RSA, they refused, saying essentially that it was "a CEC problem." Stauber's testimony confirms Hayes's version of events.

Stauber's only explanation of the debtors' failure to pursue the objects of the estate's claims is that the debtors have always looked at the funding of the plan "holistically," meaning the overall amount of the funding, seemingly unconcerned about where that funding would come from. Ignoring these obvious and significant sources of recovery for more than a year and a half is nothing less than stunning and makes clear that further injunctive relief is unwarranted.

The debtors argue, though, that

Apollo and TPG are making a contribution. Their contribution consists of the reduction in the value of their ownership interest in CEC from $4 billion to $2 billion under the plan. But the evidence showed that the $4 billion valuation is a fiction, that the real value is actually below the value of Apollo and TPG's interest in "new CEC" under a confirmed plan. Apollo and TPG do currently hold a controlling interest in CEC and stand to lose control if the plan is confirmed. That loss has a value of some kind. But no one could quantify its value, and the debtors themselves never mentioned this as a contribution.

The debtors took the position in closing argument that their injunction request isn't about settlement at all, that it's about protecting the contribution to the plan from CEC. The debtors are indeed trying to protect that contribution. But the point of the injunction has always been not only to protect the CEC contribution but to gain time to reach a settlement. And to be clear, a settlement means a consensual plan. It does not mean a cramdown plan confirmed after a contested confirmation hearing. Gaining time to reach a settlement was the goal the debtors advanced at the first injunction hearing. It was the goal the debtors advanced in the

court of appeals. It has always been the point of the debtors' requests for injunctive relief.

An injunction through a decision on confirmation is a non-starter in any event and always has been – not because bankruptcy courts lack the power to grant one, but because these sorts of injunctions are, as I said, drastic remedies and so almost always temporary, rarely more than a few months. A soup-to-nuts injunction – one running from petition date through effective date – is, as Hilty noted, tantamount to the automatic stay. Had Congress intended to permit that sort of remedy for non-debtors, it would have provided it. Except in chapter 12 and 13 cases, it hasn't done so. The two decisions – only two – that the debtors cite in which courts granted an injunction of that duration involved plans under which the creditors enjoined would be paid 100%, not the situation here.

Just as the issuance of an injunction isn't likely to enhance the prospects for a successful resolution of the disputes in these cases, I'm no longer convinced that the denial of an injunction will endanger the reorganization. As I noted in my June 15 ruling, Millstein has always acknowledged that a reorganization of these debtors

based on a CEC contribution is only one way to reorganize them, and a reorganization can in fact be accomplished without a contribution. As early as the first hearing in June 2015, he testified that it would be perfectly possible to reorganize around the value of the debtors themselves and to assign the estate's claims to a litigation trust and pursue the claims that way. Millstein thought only that the attendant administrative costs made that option less desirable. At the second hearing this past June, Millstein went further, refusing even to say that the denial of an injunction would rule out a reorganization that relied on a contribution from CEC. He could say with certainty only that consummation of the plan would be substantially delayed.

Not even a CEC bankruptcy is a foregone conclusion, Millstein admitted. Both Millstein and Hilty testified, both at the June 2016 hearing and in Hilty's case at the latest one, that in the event of an adverse judgment in the guaranty litigation there were alternatives, including the possibility of a forbearance agreement and even a stay pending appeal. At most, Millstein said, a bankruptcy would "put in jeopardy" CEC's

contribution. The debtors' offered no additional evidence on these points at the latest hearing, certainly nothing to support the prediction in the closing argument of a "catastrophe" if the current injunction weren't extended.

In my June 15 ruling, I noted all of this evidence and the weaknesses in the debtors' case but said that "on the whole the debtors' progress on the settlement front" was enough to justify further relief. That's no longer true.

The public interest doesn't favor an extension of the injunction, either. Two interests have been cited here, and I mentioned both in my earlier rulings. They are the public interest in successful reorganizations and the public interest in settlements.

The interest in successful reorganizations doesn't support further relief because a successful reorganization is possible here even if the injunction is not extended, and a denial of an extension seems unlikely to imperil the debtors' efforts to reorganize. As for settlement, past experience in this case has shown that settlements result when no injunction is in place. The injunctions I've issued have been more of an

impediment than an aid. The interest in settlement actually counsels against extending the current injunction.

That brings me to the balancing of the equities. Although I've previously questioned whether balancing is necessary in a section 105 context, I now conclude that it is. I reach that conclusion for several reasons. First, balancing isn't mentioned as a requirement in the Seventh Circuit decisions - but neither do those decisions prohibit balancing. The question simply goes unaddressed. Second, as I've observed before, balancing is a traditional part of the injunction question. Third, other circuits do require balancing when a section 105 injunction is sought, and Collier's describes balancing as "arguably the most critical element of a section 105 injunction . . . ." Faced squarely with the question, the Seventh Circuit would likely find balancing necessary.

Balancing requires a comparison of the harm to the movant if relief is denied and the harm to the non-movant if relief is granted. The debtors risk harm in a number of respects if the injunction is not extended. They face the possibility that there will be an adverse judgment in

the guaranty litigation and the resulting loss of the CEC contribution. If that happens, they risk the possibility that all the work put in on the RSAs with other segments of the creditor body will go for naught. And they face the possibility that a CEC bankruptcy will indeed produce one of "the great messes of our time," Millstein's phrase, because of the litigation that could ensue and the administrative costs that litigation could entail.

But how great are these risks? Not so great. Millstein acknowledged that they were just possibilities. CEC might win the guaranty litigation. Even if CEC loses, CEC might not file bankruptcy. (After all, CEC was threatening to file a bankruptcy case last June and the testimony at the June 2015 hearing was that it might do so even if no judgment were entered. More than a year later, no bankruptcy case has been filed.) Even if CEC files bankruptcy, there might still be a reorganization involving a CEC contribution. And even if the contribution disappears, there can still be a successful reorganization. Denial of further relief may risk the success of the current plan of reorganization; a reorganization itself is not at risk. Meanwhile, allowing the injunction to expire

now appears more likely to produce a resolution than extending the injunction.

The defendants, meanwhile, themselves face risks if the injunction is extended - particularly if it's extended as long as the debtors would like. The defendants will be stymied in their ability to seek restoration of the CEC guarantees and enforcement of their rights under them. As the court in Saxby's Coffee Worldwide observed, creditors have a substantial interest in the enforcement of bargained-for rights that should not be minimized. As the Saxby's court also observed, litigants always face some risk in their ability to succeed in litigation because of the delay an injunction produces in obtaining a prompt resolution.

In Saxby's, the court discounted those interests because no "particularized harm" had been identified, and none has been identified here. No one has identified any witnesses who are in danger of disappearing or dying, for example. On the other hand, Saxby's granted a 7-month injunction because it was relatively early in the case, and the injunction involved a "relatively modest, finite period of time." It is not early in this case - quite the contrary - and the debtors have already been the

beneficiaries of 5 months of injunctions. The injunction they want is neither modest nor finite, since it would run through a decision on confirmation. When that decision will be issued is anyone's guess, but it won't be soon. The hearing itself could prove interminable (and the delay in a decision even more so), given that 68 parties (not counting the debtors) have given notice of their intent to participate. Those parties currently intend to call 57 fact witnesses and 10 experts. Far from 5 months or 7 months, the injunction the debtors are asking for could last a year or more.

The defendants here also run another risk of sorts. The claims that some of them are asserting are brought under the Trust Indenture Act of 1939. The evidence showed that CEC has used past injunctions to lobby Congress to amend the TIA to eliminate the claims in the guaranty litigation. This isn't much of a risk, since the evidence also showed that no bill had even been introduced, let alone voted on, and in a presidential election year it seems unlikely Congress will pass an amendment to the TIA – or pass much else for that matter. But it's unseemly – and so inequitable – for CEC to employ an injunction in its favor to gain an

advantage in litigation over parties whose hands the injunction has tied. Injunctions should preserve the status quo; the status quo was evidently not enough for CEC.

In closing, counsel for the debtors placed the blame on CEC and also asserted that CEC really had "nothing to do" with the debtors' request to extend the injunction. But CEC has everything to do with that request. The injunction halts litigation against CEC, not against the debtors. (The bankruptcy cases helped the debtors, after all.) CEC therefore benefits directly from the injunction. If that weren't the case, CEC wouldn't have insisted in its own RSA that the debtors continue to pursue injunctive relief. A section 105 injunction is also known as a "third party injunction" for a reason.

Although the call is a close one, the balance of the equities tips in favor of the defendants here.

In concluding, it's helpful to keep in mind what the often-cited Saxby's decision says about section 105 injunctions:

> "The § 105 injunction should not provide nondebtors with a comfortable, 'free ride' on

the coattails of the debtor. The issuance of a § 105 injunction should not eliminate the keen sense of urgency that insider nondebtors would otherwise have to resolve, as promptly as possible, the outstanding legal and monetary disputes that gave rise to the bankruptcy case. Stated another way, the nondebtors should continue to feel pressure to expedite the reorganization process so that the injunction may be lifted as soon as possible and the ordinary legal relationships among the nondebtors restored."

The injunctions here have provided CEC, Apollo, and TPG, a comfortable, free ride on the debtors coattails. They have shown no keen sense of urgency to resolve the outstanding disputes that gave rise to the bankruptcy case – and frankly, neither have the debtors, at least where the disputed transactions are concerned. CEC, Apollo, and TPG have evidently felt no particular pressure to expedite the reorganization process. Now perhaps they will.

Whether to grant or deny injunctive relief requires a trial judge to reach a decision "based on a subjective evaluation of the import of the various factors and a personal intuitive sense of the nature of the case." Lawson

Prods., Inc. v. Avnet, Inc., 782 F.2d 1429, 1436 (7th Cir. 1986). Because in my judgment, and based on my sense of these bankruptcy cases, the debtors have managed to establish only one of the four elements necessary to have the existing injunction extended, I will exercise my discretion and deny the debtors' motion.

MR. ZOTT: Your Honor, can I have a moment?

THE COURT: It depends on what for, Mr. Zott, because I'm done with this matter now.

MR. ZOTT: I could not hear you, Your Honor.

THE COURT: I said it depends on what for, Mr. Zott, because I am done.

MR. ZOTT: Okay. Well, here is our issue, Your Honor. As you know -- I understand and I appreciate Your Honor taking the time and effort, as I said yesterday in closings. So now at this point, with the injunction having been -- our request to extend the injunction having been denied --

THE COURT: Yes.

MR. ZOTT: -- then the guaranty summary judgments will go forward on August 30th.

THE COURT: Presumably.

MR. ZOTT: We intend to appeal from Your Honor's order.

THE COURT: Sure.

MR. ZOTT: And to seek an expedited appeal. The challenge, of course, is that the summary judgment ruling could come as early as August 30th at 4:00 p.m. I know Your Honor is of the view that it probably wouldn't come then.

THE COURT: No.

MR. ZOTT: We don't have that confidence, given the fact that the district court has had it under advisement for a long time, set it one day after the injunction has been expired, and set it at 4:00 p.m. And I think the testimony was no one knows when the court will rule. Even if it's a week later, that still wouldn't be enough time to actually prosecute an appeal, even an expedited appeal.

So, we are requesting, Your Honor, and moving, and we'll do it with papers, but moving orally under Bankruptcy Rule 8007(a)(1) to extend the injunction pending appeal. This is not, obviously, to extend it through confirmation. This is to extend it just to give us the right to have a court review the substance of Your Honor's decision without

mooting it out through having the guaranty litigation go forward. And I'm prepared to address the standards here, Your Honor. We're prepared to file papers today.

I would also note, Your Honor, that -- should I keeping going, Judge?

THE COURT: Yes, please.

MR. ZOTT: Okay. So, with respect to the stay of the injunction pending appeal, Your Honor, we respectfully submit that the key issue here is to allow, given the complexity and the difficulty and the importance of the issues, to have -- to permit an appellate court, the district court, and/or the Seventh Circuit to review this decision before the potential for irreparable harm can occur to the debtors.

As Your Honor noted and has always been the case, we at least believe that the judgments threaten the $4 billion contribution that is the linchpin of the plan. We believe, as the evidence showed, it's supported by $14 billion in capital structure. We believe that the prospect of a CEC bankruptcy could be very, very harmful. Again, that in our view alone would be enough to get the injunctive relief simply during the period that an

appellate court would review. I'm not talking about for the entire length, obviously, to confirmation, or even for 30 days. We also believe we'd have irreparable harm just from not being able to have an appellate court review the court's decision.

In terms of the balance of the harm, Your Honor, we believe that the potential prejudice to debtors and to all of the creditors who support the plan far, far outweigh the harm that the litigants showed, the guaranty plaintiffs, who told the court their main harm would be having to reargue the issue again in court, which is what they told you at the closing.

On the public interest, Your Honor knows the standards there. We believe that there is a strong public interest in a successful reorganization and promoting settlement.

Finally, on likelihood of success, Your Honor, this is a little different. This would be the likelihood of success on appeal.

THE COURT: Right.

MR. ZOTT: Not the likelihood of reorganizing.

THE COURT: Right. I'm quite familiar with the standards.

MR. ZOTT: Okay. So, you also know then that it's a sliding scale, so the greater the harm, the less of a showing. We believe the Seventh Circuit already has weighed in and ruled once in this case.

THE COURT: On a rather different issue, I might say.

MR. ZOTT: Well, that's really the issue that the Seventh Circuit would have to decide. We don't agree with that, Your Honor.

THE COURT: Well, you think they've already ruled on the issue that I just discussed?

MR. ZOTT: I think in part they have. I think they ruled on the standard to apply.

THE COURT: I think I applied that standard, Mr. Zott.

MR. ZOTT: Okay. And I respect that, Your Honor. And I understand that, and I'm not here today to in any way --

THE COURT: Well, let me cut you off. There is no such thing in this court as an oral motion, number one. So, I am not in a position to address a request for a stay that you're making from the lectern. There are parties who are not even in a position to oppose your request because no one

contemplated that you would make such a request.

Number two, it seems to me that it is not possible to get a stay of the denial of an injunction pending appeal because that's tantamount to getting the injunction. If I were to extend the injunction through an appeal, not only to the district court but beyond, it would essentially be granting you exactly what you wanted that I said you couldn't have.

Also, I do not believe you have even a reasonable likelihood of success on appeal. This was the very factual determination that the court of appeals said that I had to make. Findings of fact are determined under a clearly erroneous standard. The exercise of my discretion in granting an injunction requires an abuse of discretion - in other words, a showing that no reasonable person could have made the decision that I made. And that's a really hard standard to meet. And, not surprisingly, I think what I did was reasonable or I wouldn't have done it. But I think you're quite unlikely to meet that standard.

So, you know, if you want to file a motion, I'll consider it as promptly as I can, but I'm not prepared even to enter an order one way or

the other right now.

MR. ZOTT: All right, Judge. The only issue is -- and I appreciate that, but the problem we have, of course, is we think a ruling could come as early as Tuesday.

THE COURT: I think that's really unlikely. I mean, he's going to have the argument at 4:00 o'clock in the afternoon his time. What's the likelihood that Judge Rakoff actually issues a decision that day?

MR. ZOTT: I think there is a substantial chance of that, I honestly do, because I don't think he would set something for 4:00 p.m. on all those motions.

THE COURT: Well, if you want to file a motion today - I mean, I hesitate to do this because it's completely out of order. I mean, ordinarily you would have to have an application to file an emergency motion. You haven't even done that. And I really hope to be out of here soon, to be perfectly honest.

MR. ZOTT: I know.

THE COURT: It's been a long week.

MR. ZOTT: I know.

THE COURT: But I understand what

you're doing, and I don't blame you for trying to do it. And the only question is how I can accommodate you. And I just don't want to address an oral motion for a stay pending appeal.

MR. ZOTT: Can I raise one other point?

THE COURT: Sure.

MR. ZOTT: There's also another procedure, Your Honor. It's an administrative stay pending briefing on the stay. So, in other words, there is authority that even before briefing the stay pending appeal, the court has the ability to enter a brief administrative stay that would just freeze everything while the parties brief whether or not to enter a stay pending appeal.

And that's permitted under the same rule, Rule 8007(a)(1). And we could file that brief within an hour. It then would grant the court somewhat more time to consider the factors. Now, I understand -- and so that's one option, which would be to have the court enter a temporary stay, just administrative relief, so that you could consider the stay pending appeal with something more than a day or two.

THE COURT: You anticipated my

decision, did you?

Could you point me to the rule that talks about an administrative something-or-other?

MR. ZOTT: The rule I'm relying on is Rule 8007(a)(1).

THE COURT: Yes.

MR. ZOTT: And then there's under -- and then applying that rule, because I agree it doesn't specifically refer to an administrative stay. But there is a substantial body of law, and I've got the cases I could cite to Your Honor, which recognize the authority to give an administrative stay, the purpose of which is to give the court sufficient opportunity to consider the merits of a motion for a stay pending appeal.

THE COURT: Well, I don't think that you have a chance of getting a stay, and I would rather deny your motion as fast as I can so that you can take it to the district court.

MR. ZOTT: That's the other thing I was going to raise, Your Honor. I would then request that you deny the motion, as well as the request for administrative relief, and we can go right to the district court. Because, I mean, it sounds like that's what you want to do, and I appreciate that,

and I respect it, and this is all about us trying to do our job and you trying to do your job.

THE COURT: Yes. Mr. Zott, I don't blame you for trying to do your job, and I never have. You have to understand that. As for what I want, it's not a matter of what I want. I have no desire particularly other than to go home at a certain point today.

MR. ZOTT: Poor phrasing, Judge.

THE COURT: It's what I think is appropriate given the facts and the law.

MR. ZOTT: Okay.

THE COURT: Can I have counsel's appearance, please.

MR. HOFFMAN: Your Honor, Tim Hoffman on behalf of the second lien noteholders. The people from Jones Day who tried this case are, obviously, not in the courtroom.

THE COURT: No, they didn't anticipate this.

MR. HOFFMAN: The theory was -- and I think we have only listen-only lines.

THE COURT: Yes, we do.

MR. HOFFMAN: So they cannot participate. If the debtors would like some relief

from you, I think they have to file a motion.

THE COURT: Well, what if I were to dispense with whichever local rule requires a written motion, and simply deny it as an oral motion right now? I mean, they're going to have to file something in the district court, not to mention a notice of appeal, I suspect. And then everybody will get to see that.

So if I deny the motion, then (A) nobody is really prejudiced by the fact that no one can participate because the non-participants will win; and (B) it gets the debtors to a court that may be more hospitable, although I doubt it, than this one.

MR. HOFFMAN: Your Honor, I think there is some prejudice in the fact that we --

THE COURT: How so?

MR. HOFFMAN: -- haven't seen the motion. We don't know what the --

THE COURT: Well --

MR. HOFFMAN: -- basis is, we don't know what the law is to be. I mean, I think --

THE COURT: Well, sure, neither have I. I'm talking about the argument that Mr. Zott just made. In the district court, there isn't this

opportunity for an oral motion. You have got to get your foot in the door first. That's going to require some paper and you'll see the paper. So in that respect, I don't think you're going to be harmed. The question is whether you have an objection to my simply denying their oral motion for a stay now.

MR. HOFFMAN: I mean --

MR. ZOTT: Well --

MR. HOFFMAN: I think the answer is yes, we do.

MR. ZOTT: Well --

THE COURT: Well, let him finish, Mr. Zott.

MR. HOFFMAN: And it's based upon the fact, as you just stated, Your Honor, that there are no oral motions in this court.

THE COURT: There really aren't.

MR. HOFFMAN: They have papers ready. I think they should have to file a motion, and they should have to go through the procedural requirements. And I say that especially because of the fact that our view of this hearing was the fact that it was just you were going to read the decision, and there was going to be no participation. There was going to no anything else.

THE COURT: Yes. It's not even the local rules. It's Bankruptcy Rule 9013.

MR. ZOTT: Right.

THE COURT: "Shall be by written motion, unless made during a hearing." But this isn't a hearing. This was just a ruling date.

MR. ZOTT: Well --

THE COURT: You know, believe it or not, Mr. Zott, I'd like to help you with this. I understand about stays pending appeal. And I would like to send you somewhere else because I know you're not going to get anything out of me. But I don't know that I can.

MR. ZOTT: All right. Well, Your Honor, I mean, we're in a situation now where they're obviously not going to agree to the motion I brought. So, I mean, they obviously oppose it. And Your Honor is obviously going to deny it because of the rationale that you gave, which I totally respect.

So now we -- and yet if Your Honor doesn't deny it, and they obviously oppose it, then, you know, it seems like it's -- I'm going to be potentially denied the ability to appeal what could be a $14 billion disaster against my clients. So, I mean, I think the fair thing to do is to deny it,

Judge.

And I also think this would be construed as a hearing sufficiently enough for an oral motion. When else would you bring a motion for an emergency stay other than when you lose on the issue? I don't see how else it could happen. And it's Thursday, tomorrow is Friday, and the ruling comes in Tuesday.

So at least with respect to the district court -- and you did mention that one of the reasons in your ruling was respect for other courts. So at least allow the district court the ability to look at this issue. All they're trying to do now is a pocket veto, and that is not right. I mean, it's fine to deny it, let us go to the district court, and they can make all the arguments there that they want to make.

THE COURT: All right. I am persuaded. This is --

MR. HOFFMAN: Your Honor --

THE COURT: No. We're done. I'm persuaded this is a hearing. I have an oral motion for a stay pending appeal. For the reasons I've described, the motion is denied. I'll enter an order.

MR. ZOTT: Thank you Your Honor. I appreciate it.

MR. HOFFMAN: Thank you, Your Honor.

(Which were all the proceedings had in the above-entitled cause, August 26, 2016, 3:00 p.m.)

I, AMY B. DOOLIN, CSR, RPR, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE AND ACCURATE TRANSCRIPT OF PROCEEDINGS HAD IN THE ABOVE-ENTITLED CAUSE.